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AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 263

CHARLIE HERNDON,

Petitioner.

vs.

THE STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioner, Charlie Herndon, seeks by writ of *certiorari* to have the United States Supreme Court review the decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Robeson County imposing sentence upon the petitioner for keeping, maintaining, and operating a place, structure, and building for the purpose of prostitution and assignation. The opinion of the Supreme Court of North Carolina was filed May 19, 1943, and is reported as *STATE v. CHARLIE HERNDON*, 223 N. C. 208.

FACTS

The petitioner, Charlie Herndon, with two others, was indicted at the June Term, 1942, of the Superior Court of Robeson County upon a charge that he "unlawfully and willfully, did keep, set up, maintain and operate a place, structure and building for the purpose of prostitution and assignation, and did permit a building and place under her, his and their control to be used for the purpose of prostitution and assignation, with knowledge and reasonable cause to know, that said building and place is to be used for prostitution and assignation . . . ." (R. 2). This indictment charged a violation of Section 4358 of the North Carolina Code Annotated (Michie, 1939).

The evidence tended to show that police officers went out to search the cabins connected with Herndon's filling station (R. 3). When the officers arrived, there were no lights burning (R. 4). The officers went to a cabin and found it occupied by a soldier and a woman who were not husband and wife (R. 4). Both were scantily clad (R. 4). The officers then proceeded to another cabin and found it occupied by a soldier and a woman who were not husband and wife (R. 4). Both of these individuals were scantily clad (R. 4, 5). One of the women tried to hide behind the door as the officers entered (R. 4), and the other covered up her head with the bed clothes (R. 5). Both girls were known to the officers and both had bad reputations (R. 4, 5). Neither of the couples had any baggage (R. 11). The petitioner, Charlie Herndon, was seen coming from the last cabin (R.12). The officer testified that quite often the petitioner, Herndon, was seen around the cabins; often at the office (R. 12). The petitioner's wife, Mrs. Herndon, was present and seemed to have charge of the cabins (R. 4). The petitioner owned the cabins and the service station (R. 10). The general reputation of the cabins was bad (R. 5, 12, 17, 18, 20). One of the cabins was empty when an entrance was made, but the back window was up, the screen wire torn off and fresh tracks of a man and woman were just outside the building (R. 12). When the officers

knocked on the door of one cabin, Mrs. Herndon said, "Be careful there might be a married couple in there" (R. 12). One of the girls arrested was from St. Pauls and the petitioner was originally from St. Pauls—about eight-tenths or one mile away (R. 6, 10). There was one bed in the room where a scantily clad soldier and girl were found (R. 5). The home of the petitioner was only one hundred to one hundred and fifty yards away (R. 3). There is nothing except open land and the hard surfaced road between the cabins and the petitioner's home (R. 3).

Upon conviction, the petitioner appealed to the Supreme Court of North Carolina assigning as error the overruling of his motion for judgment as of nonsuit, and certain rulings upon the admissibility of evidence. The Supreme Court of North Carolina affirmed his conviction.

ARGUMENT

I

THE SUFFICIENCY OF THE EVIDENCE TO BE SUBMITTED TO THE JURY PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

When a state court judicially determines that there is sufficient evidence of a fact to be submitted to a jury, its decision is not reviewable by the United States Supreme Court on writ of *certiorari*.

> *Noble v. Mitchell*, 164 U. S. 367;
> *American Railway Exp. Co. v. Kentucky*, 273 U. S. 269;
> *Bell Telephone Co. v. Pennsylvania Public Utility Commission*, 309 U. S. 30.

In *Bell Telephone Co. v. Pennsylvania Public Utility Commission*, 309 U. S. 30, 32, it is stated, in a *per curiam* opinion:

> "As to the first contention, it appears that the state court heard the appeal judicially and decided that there

was evidence justifying the finding of the Commission of unreasonable discrimination in the transaction of its intrastate business. In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

The following paragraph from the opinion of Justice White in *Noble v. Mitchell,* 164 U. S. 367, 373, would seem to be decisive of the question:

> "It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. *Dower v. Richards,* 151 U. S. 659 (38:306); *Re Buchanan,* 158 U. S. 31 (39:884)."

If it should be determined that the Supreme Court of North Carolina erroneously decided the case, no question would be presented for determination by this Court for it has long been held that where a party is fully heard in the regular course of judicial proceedings, an erroneous decision of the state court is not a denial of due process within the Fourteenth Amendment of the Constitution of the United States.

Bonner v. Gorman, 213 U. S. 86;
American Railway Express Co. v. Kentucky, 273 U. S. 269;

West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63.

In *American Railway Express Co. v. Kentucky*, 273 U. S. 269, it is said, at page 273:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

II

THE COMPETENCY OF THE TESTIMONY OF D. L. WHITE IS NOT A FEDERAL QUESTION.

A.

Objections to the competency or relevancy of evidence in a state court involve the application either of the general or local law of evidence, and, as such, furnish no ground for interposition by this court.

Brooks v. Missouri, 124 U. S. 394;
Sherman v. Grinnell, 144 U. S. 198;
Barrington v. Missouri, 205 U. S. 483;
Buchalter v. New York, 87 L. ed. Adv. ops. 1088.

B.

It should be noted that the petitioner's motion to strike the testimony given by D. L. White was not based upon an objection to the admission of the testimony in the first instance.

The settled rule in North Carolina is that when testimony is admitted without objection, the granting or denying of a motion to strike out rests in the discretion of the trial court.

State v. Efler, 85 N. C. 585;

State v. Lane, 166 N. C. 333;
State v. Lowry, 170 N. C. 730;
State v. Merrick, 172 N. C. 870.

The question was disposed of in this manner in the instant case. *State v. Charlie Herndon,* 223 N. C. 208, 210. This being a matter within the trial court's discretion, this court has no jurisdiction to review its action.

Carr v. Nichols, 157 U. S. 370;
Smith v. Mississippi, 162 U. S. 592;
Barrington v. Missouri, 205 U. S. 483.

Also, this question being disposed of in accordance with settled local procedure, no question is presented for decision by this court.

Van Oster v. Kansas, 272 U. S. 465;
Liberty Warehouse Co. v. Burley Tobacco Co-Op. M. Association, 276 U. S. 71;
United Gas Public Service Co. v. Texas, 303 U. S. 123.

III

THE COMPETENCY OF THE TESTIMONY OF W. C. WATTS CONCERNING A CONVEYANCE OF THE PROPERTY BY THE PETITIONER DOES NOT PRESENT A FEDERAL QUESTION.

The petitioner propounded the following question to the witness, W. C. Watts (R. 16):

> "I ask you if you did not probate and order the registration of a deed conveying this particular property by these defendants to other persons subject to that paper?"

As stated under Question No. 2, questions concerning the competency or relevancy of testimony in a state court do not present a federal question.

Brooks v. Missouri, 124 U. S. 394;
Sherman v. Grinnell, 144 U. S. 198;
Barrington v. Missouri, 205 U. S. 483;
Buchalter v. New York, 87 L. ed. Adv. ops. 1088.

However, it should be noted that the Record does not disclose what answer, if any, the witness would have given to the question. It is settled in North Carolina that an exception based upon the failure to allow a witness to answer a question will not be considered unless the Record discloses what the witness' answer would have been.

State v. Utley, 223 N. C. 39;
State v. Thomas, 220 N. C. 34;
State v. Anderson, 208 N. C. 771;
State v. Brewer, 202 N. C. 187.

This particular point was not discussed by the Supreme Court of North Carolina in the opinion in this case, evidently because, under the above cited authorities, it was clearly without merit.

If this is the basis upon which the court decided the question, no question is presented for decision by this court as the matter was disposed of in accordance with settled local procedure.

Van Oster v. Kansas, 272 U. S. 465;
Liberty Warehouse Co. v. Burley Tobacco Co-Op M. Association, 276 U. S. 71;
United Gas Public Service Co. v. Texas, 303 U. S. 123.

IV

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI, FOR THE PETITIONERS FAILED TO SET UP A CLAIM OF RIGHTS,

PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES IN THE STATE COURTS.

Although an attempt has been made to show that the questions set out in the Petition for writ of *certiorari* are not federal questions or are not of sufficient substance and importance to justify the allowance of the writ, the State of North Carolina also contends that this Court is without jurisdiction to allow the petition, for the petitioners failed to set up any of these questions *as questions arising under the Constitution of the United States* in the State courts.

Careful examination of the record will show that, although the petitioners took exceptions to alleged errors of law, they failed entirely to set up specially any rights, privileges, or immunities claimed under the Constitution of the United States in either the trial court or the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina (R. 33) treats the exceptions taken by the petitioners as raising questions of State law only. No federal questions are mentioned. The Petition for writ of *certiorari* filed in this Court omits any allegation that federal questions were set up as such in the State courts.

Under the statute authorizing review by *certiorari* of decisions of the highest courts of the several states, jurisdiction of the United States Supreme Court to review decisions alleged to involve rights, privileges, or immunities under the Constitution is limited to cases in which the rights, privileges, or immunities are "specially set up or claimed."

28 U. S. C. 1940 ed., Sec. 344.

The rights, privileges, or immunities must be set up in the state courts.

Brooks v. Missouri, 124 U. S. 394;
Hartford Life Ins. Co. v. Johnson, 249 U. S. 490.

CONCLUSION

The questions set out in the petition are not federal questions, or, if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. None of these questions were set up in the State courts as questions arising under the Constitution of the United States. Therefore, the writ of *certiorari* should be denied.

Respectfully submitted,

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